

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

OHIO VALLEY ENVIRONMENTAL)
COALITION, et al.,)
Plaintiffs,)
v.) Civil Action No. 3:05-0784
) Civil Action No. 3:06-0438
UNITED STATES ARMY CORPS OF)
ENGINEERS,)
Defendants.)
)

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Fed. R. Civ. P. 65, Plaintiffs respectfully move this Court to issue an Order that temporarily suspends Permit No. 199800436-3 issued by Defendant U.S. Army Corps of Engineers on January 22, 2007 and restrains, preliminarily enjoins, and prohibits Defendants from allowing and proceeding with timbering, clearing, grubbing, mining, and any other activities that disturb the environment at the Spruce No. 1 Mine site near Blair, West Virginia. Plaintiffs respectfully request that this Order remain in force until the Court hears Plaintiffs' motion for a preliminary injunction.

Counsel for Plaintiffs have given notice of the filing of this motion via telephone to counsel for Defendants in compliance with Fed. R. Civ. P. 65. Plaintiffs also have provided notice of this motion by telephone to counsel for Defendant-Intervenor coal companies and counsel for the West Virginia Coal Association.

In support of this motion, Plaintiffs state as follows:

In 1998, the West Virginia Department of Environmental Protection (WVDEP) granted a surface coal mining permit to Hobet Mining, Inc. (a subsidiary of Arch Coal, Inc.) for its Spruce No. 1 Mine near Blair, West Virginia. At that time, this mine was the largest mountaintop-

removal mine ever proposed in West Virginia, covering 3,113 acres (over five square miles) of land and creating valley fills and sediment control ponds that would destroy or disturb 57,775 linear feet (over ten miles) of streams. Spruce Record of Decision (ROD), pp. 2, 11, Pl. Ex. A.

In January 1999, without first preparing an EIS, the Corps granted a Nationwide Permit 21 permit (instead of an individual permit) to Hobet under § 404 to construct valley fills in waters of the U.S. as part of this project. In March 1999, Judge Haden found that the Corps' permitting decision violated NEPA and enjoined the mining operations. Bragg v. Robertson, 54 F. Supp.2d 635 (S.D. W.Va. 1999); Spruce ROD, p. 11. In June 1999, the Corps withdrew the 404 permit and agreed to prepare an EIS on this mining project.

Between 1999 and 2005, Arch modified its mining project and obtained a new mining permit from WVDEP. In December 2005, Arch Coal transferred the Spruce No. 1 mine to its Mingo Logan Coal Company subsidiary. FEIS, Abstract, p. 2. Under Mingo Logan's modified plan, the mine would cover 2,278 acres and create six valley fills that would permanently bury 36,814 linear feet (over seven miles) of streams. Id., and p. iv.

To attempt to mitigate this stream loss, Mingo Logan proposed a mitigation plan to create 43,565 feet on-site drainage ditches, restore 7,132 feet of on-site streams, enhance 11,272 feet of off-site streams, and develop more defined channels in 26,625 feet of existing non-jurisdictional drainage ways. FEIS, p. vii; Revised Compensatory Mitigation Plan, pp. 18, 21. Based on this plan, the Corps calculated that the mining project would result in a "net gain" of waters of the U.S. FEIS, p. vii; Plan, p. 26.

Mingo Logan applied to the Corps for an individual § 404 permit. The Corps issued a Draft EIS (DEIS) on this project March 31, 2006 and a Final EIS (FEIS) on September 22, 2006.

71 Fed. Reg. 16293, 55441. On January 22, 2007, the Corps issued a Record of Decision and an individual § 404 permit No. 199800436-3 under § 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, to Mingo Logan Coal Company. The permit incorporates the mitigation plan described above. Permit, Pl. Ex. B.

The Spruce permit raises many of the same issues that the Court is currently considering as a result of the October 2006 trial in this action, except that the Corps prepared an EIS on the Spruce mine, but not for the other mines. However, Plaintiffs contend that the EIS has substantially the same defects as those contained in the Corps' Environmental Assessments on the other mines.

In particular, Plaintiffs are again challenging the Corps' reliance on compensatory mitigation to offset the loss of the buried streams. In the Spruce No. 1 Permit, the Corps again assumes that the mine operators can replace the biological and aquatic functions of over seven miles of buried streams by creating eight miles of drainage ditches in the mined area and on top of the valley fills. This Court heard extensive testimony on this issue at trial. Plaintiffs demonstrated that (1) the Corps has no scientific basis or substantial evidence to assess the functions of streams that are buried by valley fills; (2) the Corps has no scientific basis or substantial evidence to conclude that the structures or functions of buried streams will be offset by attempted stream re-creation, restoration or enhancement pursuant to compensatory mitigation plans; and (3) the Corps has no scientific basis or substantial evidence to conclude that the cumulative environmental effects of the new mines will be insignificant either individually or collectively with other mining projects.

Time is of the essence in securing a temporary restraining order and preliminary

injunctive relief from this Court. Counsel for Mingo Logan has informed Plaintiffs' counsel that timbering, clearing and grubbing operations have already commenced in the Seng Camp watershed, and timbering and clearing will commence in the Pigeonroost watershed by the end of this week. Accordingly, unless an Order is entered immediately, the permanent damage that Plaintiffs seek to avoid at these mines will be at least partly completed before this Court has time to hear Plaintiffs' motion for a preliminary injunction.

For these reasons, the Plaintiffs respectfully move this Court to grant the following relief:

1. Schedule a hearing on this Motion at the Court's earliest convenience;
2. Issue an Order pursuant to Fed. R. Civ. P. 65 that:
 - a. Immediately suspends the effectiveness of the permit issued on January 22, 2007 by the Corps of Engineers under Section 404 of the Clean Water Act that would allow mining activity to commence at the Spruce No. 1 Mine.
 - b. Maintains the *status quo* for all mining activities at the Spruce No. 1 Mine and halts any new mining activities (including grubbing, clearing, timbering, and the construction and operation of valley fills and sediment ponds) at that mine until the Court hears Plaintiffs' motion for a preliminary injunction.
 - c. Requires Defendants to monitor activities at the mine site to ensure that the terms of this Order are met.

Respectfully submitted,

/s/ Joseph M. Lovett
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CERTIFICATE OF SERVICE

I, Joseph M. Lovett, hereby certify that on January 30, 2007, I electronically filed the foregoing Plaintiffs' Motion for a Temporary Restraining Order with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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I hereby certify that I have mailed the document by United States Postal Service to the following non-CM/ECF participants:

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I hereby certify that, pursuant to US District for the Southern District of West Virginia,

Administrative Procedures for Electronic Case Filing, Rule 13.9, I have mailed a courtesy copy
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